

**“Lex Salutis, Salus Legis...”**

**John R. Seeley**

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ANYONE almost who had the patience and took the trouble to read the thirty- page report on "Mental Health Legislation" in the 1963 issue of this JOURNAL must, if he cared at all about mental health, have had his own mental health adversely affected. How could so many have taken so long to produce so little so late? All the good work of all the good lawyers, all the good labour of all the good "caretakers" (psychiatrists, psychologists, social workers, and their friends and colleagues), and all the goodwill of all the earnest and competent legislators-has produced-what? Judging by the reports, a disorderly mish-mash of statute law within provinces and between them, about as well-thought-out, about as informed by principle, about as apt for its function as the freight rate structure or the tariff regulations. And yet we can manage better with messy economic legislation which affects mere relative property rights among men than we can with messy mental health legislation which defines by inference the properties of men: what it is to be human, what it is to differ, what are to be the consequences of difference.

In principle, "mental health legislation" covers at least as wide and important a province as "criminal law." Indeed, the distinction between the two bodies must be very fine. The second, the more familiar, regulates roughly what is to be done when someone will not do what is (somehow) required, and the first, and less familiar, regulates what is to be done when he can not. No matter what metaphysical position is ultimately taken, the border-line between these two classes of events has to be drawn on an empirical basis: we conclude that someone cannot do a given thing if he does not (or would not) respond the way we want after or in the face of the maximum sanctions we are willing to apply. The provision "or would not" allows us to use our heads, for prediction on the basis of experience with others "like" him, so that we are not forced in every case to exhaust sanctions before concluding disability: so that we need not actually (though we frequently do) punish psychotics for their behaviour before we conclude that, in certain respects, they cannot help themselves, and hence, in those respects at least, are not criminally accountable. "Not criminally accountable" means exempt from (because, presumably, unfit for) the normal reward-punishment game that the criminal law dramatizes and epitomizes and the civil law fills in, in detail.

On the view taken, we must deal, to begin with, with the whole set of provisions as to what is to be done when someone does not do what is (somehow) required. Changes in

what is required (legislation) bring into existence by human acts (or Acts) new classes of persons who will not or can not meet the legislatively imposed tests upon which freedom of the person rests as a right (in the legal, rather than the moral, sense that a court will enforce it). Changes in what we are willing to use as sanctions alter the boundaries between (legal and effective) "will not" and "can not," and hence shift classes of persons in and out of the categories of "criminal" and "sick," "reprehensible" and "prisoner" and "patient," "to be reformed" and "to recover," to be punished and (if the actual facilities were not in so many cases so God-awful) to be compensated, to be taken from, respectively, and to be given to.

Ours is a society that is (seemingly inevitably) growing more complex. We would like to think-or most of us would, most of the time-that it is simultaneously growing more humane. Unless we can find by eugenic or educational procedures radically different new ways to compensate, increased complexity means surely that the proportion of persons who do not do what is required must increase beyond anything most of us have ever imagined. And, in the face of increasing humaneness, which implies at least decreasing severity of sanctions, the proportion of those who "can not" among those who do not must sharply increase also. So we must look forward to "mental health legislation" (or something equivalent to it) as governing a very large fraction, if not a majority, of any population in the future in any of the developed and affluent societies at least. What the social effect would be when indeed a minority were regulated by laws for the "normal," and a majority by the laws for those "exceptional" (in a pejorative or even charitable sense), is hard to imagine, but needs to be thought about-now.

I say "now" because I am not sure that the state of affairs I portray for the future is not the state we are already, unrecognizedly, in at the present. If not, the future portrayed is so proximate as to be almost upon us, and what we have thought through so far in relation to what we certainly have as the current state of affairs is pitifully inadequate and confused.

For, in fact, the distinction I have drawn in order to make a point has no sooner been drawn than it has to be fudged. What little we have discovered in the social sciences for certain (or "beyond a reasonable doubt," as they say) has gone to reinforce long-standing common-sense perceptions: at least to the effect that neither persons nor acts can be neatly divided into "can not" and "will not" categories. It is not simply that we outsiders (judges and juries or persons acting as such) do not know or find it difficult to decide when to take the "he couldn't" and when to take the "he wouldn't" point of view. It is rather that people and their behaviour are not subsumable under such gross distinctions, even for the crude purposes for which law is required to function. It is not

only that "the person" is, like the corporation, a "legal fiction," so that his continuity is only partial and what he may be "unwilling" to do one day or hour he may be "unable" to do the next; it is also that in his every act there is a complex entanglement of free and bound elements and forces that make it difficult (or meaningless?) for anyone, or anyone less intimate with him than his psychoanalyst, to say what freedom, and therefore responsibility, he might properly be said to have in a given respect at a given instant.

But it is more complex than that.

For the view that has been taken and the view that will be taken-or, rather, his view of these things-as to what he could not (and would not) do, enters as an element into what "actually" he can and cannot do, that is, the public suppositions enter into what is privately supposed to be supposed, and hence into the context of action, and hence, importantly, into action itself. And, reci- our suppositions, and hence our laws, and hence the context for future action, procally, what we see in action itself furnishes the data from which we draw public and private.

Hence, "criminal" and "mental health" law (or their equivalents) can, do, should, and must "infect," if not interpenetrate each other. (Indeed, to some extent they are already in an obscure way doing so, which accounts for our dis- comfort in talking actually carried out, each having an admixture of the other, and neither having any "admissible," let alone clear, philosophy or rationale.)

This note must not be extended into a major essay now. Enough has been said to indicate why the report and comment on "mental health legislation" is disappointing to me in the substance it reports (the law itself) and the manner in which it reports it. Not that the manner is not kind and polite and grateful. It is; and that is what astounds me. People who, if they understand what they are themselves saying, are sitting on top of an imminent and immanent revolution in the Western world, report cheerfully and with thanks that we have improved the ways we shunt people into and out of or between institutions, that a province here or there has codified or clarified bad or outmoded statute law, that slight diminutions of strangeness between lawyers and psychiatrists have taken place. Even in its own terms, this is too little, far too late. But in terms of what confronts us it seems like eulogizing the Department of Defence for withdrawing booklets regarding the use of bows and arrows, or praising the Department of Health and Welfare for ceasing to attribute our ills to demons. It is progress, of a sort-of a geologic sort-in a society in change at electronic speeds.

Or so I see it.